



# Department of Law Monthly Report

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Gregg D. Renkes  
Attorney General

Scott J. Nordstrand  
Deputy Attorney General – Civil Division

Patrick J. Gullufsen  
Deputy Attorney General – Criminal Division

## Fair Business Practices

### PHYSICIAN'S LICENSE SUSPENDED FOR TWO YEARS

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On January 30, 2003, the State Medical Board approved a Memorandum of Agreement (MOA) negotiated between the Division of Occupational Licensing and Anchorage osteopathic physician Samuel Schurig continuing the board's October 24, 2002, summary suspension of Dr. Schurig's medical license for two years. The suspension was originally imposed after Dr. Schurig chose not to attend a board-ordered psychiatric and medical evaluation; the evaluation was ordered because an investigation by the division revealed that Dr. Schurig was self-medicating with Zoloft, had made suicidal statements, and had prescribed, without medical justification, approximately 40,000 units of controlled substances to a female patient. Dr. Schurig left these medications in a shed outside his office, in a dumpster in his office parking lot, and next to a boulder near his home for pickup by this patient. Dr. Schurig also pre-signed prescription forms and left them at his clinic where physician assistants used them to prescribe controlled substances.

In addition to the suspension, the MOA requires that Dr. Schurig pay a \$40,000 fine (with \$10,000 suspended), permanently surrender his DEA Controlled Substances Registration for Schedule II and III controlled substances, undergo the psychiatric and medical evaluations originally ordered by the board, attend and complete a continuing education course regarding physician-patient boundary issues, and agree, if his license is reinstated by the board after two years, to limit his practice to that of a family practitioner. AAG Robert Auth represented the division in this proceeding and in the settlement negotiations.

### **ACS CHALLENGE OF RCA DECISION DISMISSED**

*ACS v. RCA Commissioners* was a federal court challenge by ACS to a decision made by the RCA under the Telecommunications Act of 1996. The RCA had required ACS under the provisions of the Act to participate in an arbitration with GCI to allow GCI to offer certain competitive local telephone services in 12 rural Alaskan communities including communities on the Kenai Peninsula, Kodiak Island, Delta Junction, North Pole, and Ft. Greely.

ACS' complaint, filed in October, asked for declaratory and injunctive relief, claiming that federal law (the Telecommunications Act) and an existing agreement between ACS and GCI barred the RCA commissioners from ordering the arbitration.

After service, the RCA commissioners, through AAG DeVries, filed a motion to dismiss alleging lack of subject matter jurisdiction, lack of personal jurisdiction under the Eleventh Amendment, and for dismissal for failure to state a claim upon which relief could be granted.

While the motion to dismiss was pending, and just three days before Christmas, ACS filed a Motion for Temporary Restraining Order &

Preliminary Injunction. The TRO motion was denied after full briefing on January 22.

The court heard oral argument on the RCA's Motion to Dismiss on January 31, 2003. From the bench, District Court Judge John Sedwick granted the RCA commissioners' Motion to Dismiss. The court agreed with the Commissioners' motion that it lacked subject matter jurisdiction to hear the case. The court did not reach the other reasons argued for dismissal.

**Electric Rate Case Decision Issued.** On January 31, 2003, the RCA issued its decision on Chugach Electric Association's general rate case. The rates ordered by the commission will govern retail electric rates charged by Chugach for its retail and wholesale customers (Matanuska Electric Ass'n, Homer Electric Ass'n, and the City of Seward). The Public Advocacy Section was represented by AAG DeVries during this three week trial.

The commission's 72-page order includes findings on rate base, depreciation, rate of return, and contested operating expenses. The net effect of the order will be a reduction in rates for all classes of Chugach's customers. Reconsideration requests are pending which, if adopted, could materially effect the impact of this order.

## **Governmental Affairs**

### **STATE PREVAILS IN PFD INITIATIVE CASE**

Judge Wood of the Fairbanks Superior Court granted the state's motion for summary judgment in a lawsuit challenging the lieutenant governor's rejection of an application for an initiative. The plaintiff had applied last year to put an initiative on the ballot that would restore the "Peace Corps" service exemption to the statute concerning the term of residency required in order to qualify for a permanent fund dividend. The lieutenant governor relied

upon our advice to deny certification of this initiative application. We had advised the lieutenant governor not to certify the application because the law to be initiated would constitute an appropriation, and the Alaska Constitution prohibits enactment by initiative of laws on appropriation. Judge Wood agreed with the state's analysis, and upheld the lieutenant governor's decision against the plaintiff's challenge.

### **STATE WINS BLANKET PRIMARY CASE AT 9TH CIRCUIT COURT OF APPEALS**

In what we hope is the last part of the approximately ten years worth of litigation concerning Alaska's blanket primary, the Ninth Circuit Court of Appeals recently denied the plaintiffs' motions for relief from judgment, and for attorney's fees. The plaintiffs had lost in their earlier attempts in both state and federal court to challenge Alaska's former blanket primary election law. A few years later, the United States Supreme Court issued a decision in a case challenging California's blanket primary election, invalidating the blanket primary election.

Following the U.S. Supreme Court decision, Alaska immediately came into compliance by changing Alaska's blanket primary election to a modified closed primary. The plaintiffs in the Alaska case attempted to rely upon the later U.S. Supreme Court decision concerning California's blanket primary as a basis for their motion for relief from the prior judgments upholding the Alaska blanket primary. The plaintiffs also moved for their attorney's fees from the many years of past litigation concerning Alaska's blanket primary election. The state had opposed the plaintiffs' motion for relief from judgment, and motion for attorney's fees, arguing that a later change in decisional law is not a valid basis for relief from judgment, and that plaintiffs were in no way prevailing parties in the litigation on Alaska's primary election. The Ninth Circuit Court agreed with the state's position, and

denied the plaintiff's motions for relief and for attorney's fees.

### **SUMMARY JUDGMENT GRANTED IN WRONGFUL DISCHARGE SUIT**

Judge John Reese granted summary judgment to the state in a suit filed by a former employee of the Department of Transportation and Public Facilities. The department had decided not to retain the employee after four weeks of his probationary period because he seemed to have difficulty following directions. The former employee claimed that the department lacked just cause for not retaining him and had violated his constitutional right to due process. Judge Reese agreed with the state that no just-cause requirement applied to the employee's probationary employment and consequently the employee had no property interest in his continued employment to support a due-process claim.

### **CHALLENGE TO WAGONER ELECTION FAILS**

The Alaska Supreme Court on January 17, 2003, upheld the election of Tom Wagoner to a senate seat. Following the November general election in which Wagoner was the prevailing candidate for senate district Q, two Kenai-area voters challenged the election. They claimed that Wagoner's omissions of financial interests that AS 39.50.030 required him to disclose should disqualify him from office. The voters' challenge was based on AS 39.50.060(b), which they argued should be interpreted strictly to deny certification or installation for any omission of a required disclosure, however minor.

The court expedited the case. The challengers' motion for a TRO and preliminary injunction was denied on November 27. Cross motions for summary judgment were filed on December 17 and argued on December 23. The court denied the motions on December 26, but determined that the matter should proceed as an election contest under AS 15.20.540, even

though the challengers had not satisfied the procedural requirements for bringing an election contest. (Only ten qualified voters or a defeated candidate can file an election contest).

The voters filed a petition for review, which the state opposed. In the meantime, the case was tried before the court on January 2. On January 6, the court issued its decision denying the election challenge, finding that the challengers did not establish a corrupt practice sufficient to change the outcome of the election under AS 15.20.540(3). The challengers appealed the decision, and the appeal was briefed on an expedited basis. Because the appeal included a separation of powers question, the legislature participated by filing an amicus brief. The court heard oral argument on January 17, and issued an order upholding the election approximately two hours later. The order stated that an opinion would follow in due course. On January 21, Senator-elect Tom Wagoner was sworn in along with the other legislators.

### **PERSONNEL NEWS**

The Juneau Governmental Affairs section welcomed Keith Levy to our section in January. Keith is an experienced attorney who worked in a variety of positions before joining our section. Most recently, Keith was in private practice for a number of years in Juneau before joining the governmental affairs section to work on retirement and benefits matters.

AAG Landa Baily will be departing the Juneau Governmental Affairs section on March 1, to take a position as a Special Assistant to the Commissioner of Revenue. Landa transferred to Juneau from the Anchorage AGO Health and Human Services section. In the Juneau Governmental Affairs section, Landa worked on retirement and benefits matters, in addition to a general governmental affairs practice. We will miss Landa, and wish her luck in her new job.

## **Human Services**

### **CINA CONFERENCE**

On January 30 and 31, 2003, all Human Services attorneys and paraprofessionals from around the state attended an AGO CINA conference in Anchorage. It has been reported that the conference was helpful and insightful for the attorneys.

### **AAG LISA NELSON SELECTED FOR AWARD**

Assistant Attorney General Lisa B. Nelson has been selected by the Department of Health and Social Services to receive a 2003 Commissioner's Award from the Administration of Children, Youth, and Families (AYCF) for her outstanding achievements in the field of child abuse and neglect prevention. The Commissioner's Award is presented to an individual from each state and territory who has made a significant contribution to the prevention of child abuse and neglect and has inspired others to join in this important endeavor. In recognition of her leadership, dedication and accomplishments, Lisa is invited to the Commissioner's Award Ceremony and Reception held during the 14th National Conference on Child Abuse and Neglect in St. Louis, Missouri on March 31 through April 5, 2003.

### ***CHRISTINE, INC. v. STATE, et al.***

In January 2003, the Juneau Superior Court granted the state's motion for summary judgment in the above matter. This case stemmed from the Division of Mental Health and Developmental Disabilities (DMHDD) decision not to certify Christine, Inc., to be a direct provider of waiver services for the disabled.

In 1999, Christine, Inc., had submitted an application to provide direct services under the Home and Community Based Waiver program. The application was incomplete. Rather than deny the application at that time, DMHDD decided to offer technical assistance and help. Despite the efforts of DMHDD, the application never met muster and was eventually denied. The notice of denial provided Christine, Inc., with a notice to appeal that decision through an administrative process. Christine, Inc., allegedly sought an administrative review but simultaneous to that process it sued for money damages in state court. The allegations were violation of constitutional rights, interference with contractual rights, and intentional infliction of emotional distress. A motion on the pleadings disposed of the interference claims as to the state and the defendants in their official capacity as well as an admission that the corporation could not sue for emotional distress.

The state then moved to resolve the remaining issues on summary judgement, arguing essentially that there may be remedies but they did not include money damages assessed against the state of the individual defendants. Christine, Inc., cross moved and in a 98-page motion, a banker box full of exhibits argued that the state and, in particular the named defendants should be liable because of a pattern and practice of wrongful behavior related to Christine, Inc., based upon circumstances and issues that were not properly plead in the complaint. After oral argument, where counsel for the plaintiff urged the court to make "new law" amounting to creating a cause of action against the state and the defendants for a constitutional tort, the court ruled that there was no evidence of wrong doing and that it was not inclined to make new law. Accordingly, summary judgment was entered in favor of the state and the individual defendants. AAG Stacie Kraly handled this case.

## Legislation/Regulations

### **LEGISLATURE CONVENES AND DEPARTMENT OF LAW PROVIDES LEGAL ASSISTANCE ON BILL PACKAGE**

During January 2003, the Legislation and Regulations section spent a busy month editing and drafting documents for the governor's consideration for the 2003 legislative package. The section also assigned bills to assistant attorneys general for legal reviews.

The section also reviewed several important regulations projects, including cost-containment regulations for the Medicaid program, regulations for upcoming fisheries, occupational licensing regulations for Board of Certified Direct Entry Midwives and Board of Dispensing Opticians, and regulations for the Regulatory Commission of Alaska concerning joint use by utilities of utility poles and related facilities.

## Natural Resources

### **SUPREME COURT RULES IN ATTORNEY'S FEE DISPUTE**

The Alaska Supreme Court issued an opinion in *Koyukuk River Tribal Task Force on Moose Management v. Frank Rue*, No. S-9865. The task force had sued the state in an effort to overturn the moose hunting regulations for the Koyukuk River drainage, Alaska's fourth-largest river system, alleging that they violated sustained yield and subsistence mandates. Their claims were dismissed, without prejudice, for failure to exhaust administrative remedies, since they had never approached the Board of Game with their concerns. The state filed a routine request for attorney fees as the prevailing party, and the task force responded by claiming to have been public interest

litigants, while submitting no evidence as to membership, lack of economic incentive to sue, or any other factor necessary to establish public interest litigant status. The trial court awarded costs and fees to the state. The task force appealed the award of costs and fees, but not the dismissal. They argued that under several recent rulings by the Alaska Supreme Court, the trial court should simply have determined their public interest litigant status without the need to file specific evidence on point.

The Alaska Supreme Court agreed with the state's argument that such rulings required evidence, but it vacated the award of fees and remanded the case to the trial court so that the task force could have another chance to submit evidence on point. Meanwhile, the task force had brought another suit, which got to the merits of their claims after they pursued their administrative remedies, and the state obtained summary judgment dismissing their new claims. This time, they appealed the substantive decision and oral argument was recently held in Fairbanks, so another decision is pending in the dispute.

### Special Litigation

#### **FEDERAL COURT DISMISSES SEC. 1983 CASE AGAINST STATE DEFENDANTS ARISING OUT OF A CRIMINAL PROSECUTION**

Zebulon Nudson filed a lawsuit alleging sec. 1983 violations and seeking declaratory and compensatory relief arising out of his criminal prosecution for homicide. His complaint requested damages of \$30 million. (He was acquitted at trial on his defense of self-defense by a Kenai jury.) His attorney originally filed the suit in state court; the state defendants removed it to U.S. District Court.

The state defendants filed a Motion for Judgment on the Pleadings arguing that the state defendants had absolute and qualified immunity. A motion to dismiss the request for a mandatory injunction was filed on behalf of then Governor Knowles and Attorney General Botelho asserting the doctrine of separation of powers, comity, and lack of standing and failing to articulate the violation of a clearly established Constitutional right. In a 23-page Order, Judge Singleton granted the motions, dismissing all claims against the attorney general, the governor, the district attorney (Dwayne McConnell), and all but two of the claims against the investigating trooper. The remaining two claims were dismissed with prejudice through a stipulation of the parties.

Assistant Attorney General Stephanie Galbraith did an exhaustive job researching the law, reviewing the records from the criminal prosecution, and briefing the numerous claims and theories alleged by plaintiff as violations of constitutional rights.

#### **LAWSUIT FOR DAMAGES AGAINST DOT DISMISSED ON SUMMARY JUDGMENT**

Judge Michalski granted summary judgment to the state Department of Transportation and Public Facilities in a case involving a traumatic injury to five-year-old Alexander Guerrero, when he was struck by an automobile while running across C Street in 1994. Summary judgment was also granted to AHFC, which ran Loussac Manor where Alexander and his family lived. Several years earlier, the case was before the Alaska supreme court in *Guerrero v. State, AHFC*, but it had been remanded to the trial court after the supreme court reversed the trial court's grant of a motion to dismiss under Civil Rule 12(b)(6). Plaintiffs had sought \$25 million in damages. An appeal by Plaintiffs is likely. The case has been handled by a succession of assistant attorneys general over the years that it has been in litigation. Final trial preparation and the successful summary judgment motion was filed by AAG Venable Vermont, Jr.

## **DISMISSAL OF CASE ON LEGISLATIVE IMMUNITY GROUNDS AFFIRMED**

The Alaska Supreme Court affirmed the trial court's dismissal of a lawsuit against a current and a former legislator on the basis of legislative immunity. Three ferry workers and their spouses had sued the co-chairs of the 1996 House Finance Committee, Mark Hanley and Richard Foster, claiming that committee minutes and discussion about the state's settlement of the COLD (cost-of-living differential) dispute had defamed them. Superior Court Judge Larry Weeks found that their claims were barred by legislative immunity, because the conduct at issue was quintessentially legislative. One of the plaintiff couples appealed, but the supreme court agreed with the trial court that the legislators could not be sued. AAG Susan Cox represented Rep. Foster and former Rep. Hanley.

## **NINTH CIRCUIT AFFIRMS DISMISSAL OF PRO SE LAWSUIT**

A man charged with assaulting Copper River School District officials over a dispute about his wife's employment filed suit in federal district court against a trooper and prosecutor, claiming that his civil rights had been violated. That action was consolidated with his wife's employment discrimination suit against the school district. AAG Susan Cox represented the state officials and obtained dismissal of the prosecutor on prosecutorial immunity grounds. After his criminal conviction in state court, the man decided to pursue recourse in the Alaska Court of Appeals and withdrew from the federal court case. However, when summary judgment was issued against his wife, both husband and wife appealed to the Ninth Circuit Court of Appeals. Fortunately, the Ninth Circuit had no trouble determining that there was no merit in the husband's appeal. (The judgment in favor of the school district, represented by private counsel, was also affirmed.)

## **Criminal Division**

### **ANCHORAGE**

Anchorage started the new-year off with three homicides in January. A long-time employee of the State Department of Transportation and Public Facilities was found dead in his home after co-workers became concerned when he did not show up for work. His death was ruled a homicide and the investigation continues, with prosecutors working closely with the police department on the case. Investigation is also continuing into the death of a woman found dead inside a mobile home in East Anchorage.

The third homicide in January resulted in the arrest of William Wilett, who was charged with murder in the first degree for the beating death of his girlfriend, Lorene Boehly. Boehly was a counselor with the Veterans Administration. When she did not show up for work, co-workers called police. Officers found her dead in her home that she shared with Wilett. Wilett was also present, semi-conscious from an apparent drug overdose. Wilett ultimately confessed to beating Boehly to death after getting into an argument. He is being held on \$100,000 bail.

A foster parent, was charged with felony possession of child pornography, after one of his foster children discovered a videotape of the man committing sex acts with young boys. Police believe the videotape was made in Arizona in 1994 or 1995, and they are coordinating with Arizona officials to locate the victims of the sexual abuse depicted in the video; the sexual abuse charges carry a potential penalty in Arizona of a life sentence. The man remains in custody on \$100,000 bail.

After prolonged litigation, a Superior Court Judge ruled that Joshua Wagner was competent and allowed him to enter a plea of guilty to murder in the first degree, against his

defense attorney's advice. Wagner had confessed over two years ago to the 1996 murder of Joseph Gonzalez during a gang-related shoot-out, and had wanted to enter a plea to the charges from the beginning, but his court-appointed attorney had asked the court to find he was not competent to make that choice. Following the entry of his plea, a sentencing hearing was held and Wagner was sentenced to 60 years in prison.

The murder trial of Joshua Wade started this month. He is charged with the murder and sexual assault of Della Brown in September 2000. The trial is expected to last six to eight weeks.

### **BARROW**

After a three-day jury trial, Brenton Rexford was convicted of a domestic violence assault for holding down his girlfriend and pulling her hair, and he showed why most defense attorneys don't want defendants to testify. The defense was "it was only foreplay" and "no one was hurt." When asked on cross-examination how he knew the victim wasn't hurt, the defendant stated, "When I've beat up women in the past they were black and blue afterwards, but that didn't happen this time." The defendant was sentenced to the maximum twelve months in jail, plus two months of probation time was revoked with time to be served consecutively.

Grant Hutchison was sentenced to four years for his eighth DUI, plus two years of probation time was revoked with time to be served consecutively.

Charlie Ben Ahmaogak was sentenced to five years with two years suspended for assault in the third degree. The defendant was also fined \$3,000 and was placed on probation for five years.

### **BETHEL**

Mark Tulik was convicted of sexual abuse of a minor in the first degree after a jury trial.

In the grand jury one person was indicted for alcohol importation and possession of alcohol for sale, four were indicted for assault, three for vehicle theft, two for sexual abuse of a minor, one for sale of liquor without a license, four people were indicted for felony theft, two for sexual assault, one for misconduct involving a controlled substance, one for sexual abuse of a minor and solicitation, and one for felony DUI.

### **DILLINGHAM**

William Yohak changed his plea of no contest to one count of murder in the first degree and one count of murder in the second degree for killing a 14-year-old girl and another man. In early February 2001, Yohak raped the girl, killed her and took her body to the local landfill in Manakotak. When the search for the young woman picked up momentum in the following week, Yohak then killed the other man. The killing was staged to look like a suicide and Yohak made statements to authorities trying to make it look as though the man had killed the girl and then committed suicide. As a condition of the change of plea, Yohak agreed to receive a sentence of 99 years. Sentencing is scheduled for June in Dillingham. The court will have the discretion of whether to restrict Yohak's parole eligibility.

### **FAIRBANKS**

Corinne Vorenkamp obtained a sentence of 11 years with six suspended in a case of sexual and physical abuse by William Mackey of Bettles. The defense had argued, with the support of a psychologist, that it was merely coincidence that he engaged in sexual contact with his children on a regular and frequent basis during horseplay, notwithstanding that much of the contact occurred at night while the girls were sleeping.



In two separate grand jury presentations, six men were indicted for a two-day episode of sexual abuse of two girls, ages 12 and 13. Most of the defendants have criminal histories as juveniles from other states, including one convicted sex offender who was not required to register in Alaska because of the current federal court injunction.

## **KENAI**

January brought in a rash of alcohol and drug-related crimes on the Peninsula. The grand jury indicted several felony DUIs, some felony drug cases, and a felony assault in which the passenger in a motor vehicle being driven by a drunk driver was injured.

A crime spree involving four co-defendants was investigated by the troopers. The co-defendants were charged by the grand jury with stealing guns in one burglary and then using the stolen guns in an attempted murder at another residence.

Dumb driver of the month: An officer recently stopped a vehicle for not having illuminated license plates and an obscured rear window. The officer also found the occupants were not wearing their seatbelts. Upon returning to the suspects' car with the numerous violations and warning tickets, he discovered the occupants partaking of a leafy green matter that tested positive for THC. The driver failed field sobriety tests and was also charged with DUI.

Dumb burglars of the month: Two men were indicted for burglarizing an auto dealership, and for felony criminal mischief, when their attempts to cut a safe open resulted in it actually being irreparably welded shut and the money inside burned to a crisp.

## **KETCHIKAN**

Carl Abuhl was sentenced to 60 years to serve for his conviction on murder in the second degree and to 90 days jail for cruelty to

animals. Abuhl beat a friend to death with a baseball bat and then microwaved his friend's cat. The sentencing judge was unsure of the sentence to impose until Abuhl gave a rambling 30 minute allocution in which he talked about how his killing of his friend was justified and making veiled threats against others.

The only jury trial in January resulted in a not guilty verdict. Pat Durkin was found not guilty of possession of child pornography for having a number of images of child pornography on his computer. His defense was inadvertence, in that he collects adult pornography off the Internet and downloads so much that he occasionally downloads child pornography.

The grand jury was busy with drug cases in January. Four different people were indicted on charges ranging from second-degree to fourth-degree misconduct involving controlled substances. Two people were indicted for sexual abuse of a minor in the second degree, and one person was indicted for sexual assault in the first degree. Others were indicted for assault in the second degree, felony DUI, and vehicle theft in the first degree.

## **KODIAK**

A Kodiak woman was indicted for felony theft, after being caught applying for and receiving \$4,895 in unemployment benefits during a period in which she was employed full time. The fraud was discovered when she mailed an unemployment insurance claim form to the Kodiak Borough office, where it was opened by the wife of her then-current employer.

A Kodiak man was indicted for sexual assault in the first degree after his sister-in-law, who was spending the night sleeping on her sister's sofa, awoke to find her brother-in-law having sex with her. A March trial date is pending.

The father of a defendant convicted and imprisoned for drug dealing in October of last year, was himself indicted for two counts of selling cocaine to an undercover informant

working for the Kodiak Police Department. An April trial date is pending.

A 63-year-old Kodiak man, who had previously had a felony marijuana distribution case against him dismissed when the court suppressed the evidence, was indicted again for two counts of selling marijuana to an undercover informant working with the Kodiak Police Department. One would have hoped that the prior close call would have been a deterrent.

A Kodiak man previous convicted of misconduct involving a controlled substance in the third degree, a class B felony, was indicted in January for misconduct involving a controlled substance in the second degree, a class A felony, after having sold morphine to an undercover informant working with the Kodiak Police Department. An April trial date is pending.

### **KOTZEBUE**

A 20-year-old man from Ambler was indicted by a Kotzebue grand jury for sexual abuse of a minor in the second degree for having sex with a 14-year-old girl. During the grand jury testimony the victim's mother, apparently in an effort to exculpate the defendant, testified that she encouraged her daughter to have sex so that she could have a grandchild. The grand jury then, on its own, indicted the mother on sexual abuse charges for causing or encouraging the abuse.

Walter Pungalik of Selawik was sentenced to fifteen years with seven suspended after his conviction of sexual assault in the first degree. Pungalik had inserted a plastic toy into the vagina of a two-year-old girl causing serious injury to the child.

Two men from Selawik were indicted on one count of first degree burglary and two counts of robbery in the second degree, after they tried to rob money from a home where gambling was taking place. The suspects

stole about \$100 in cash and struggled with several people in the home before leaving.

### **NOME**

A Nome jury convicted David Antonsen-Csiki of felony theft after a complicated trial. The defendant was a University of Alaska employee and was charged with timesheet fraud: claiming hours worked to which he was not entitled. Part of the evidence was that the defendant claimed that he had worked his regular forty-hour week when he was vacationing in Mexico. The state introduced 110 exhibits and expert accounting testimony. The defense had union representatives and previous campus directors talking about "industry practices," etc. So the case was essentially a civil trial with criminal consequences.

A man was indicted for assault in the second degree, for strangling his girlfriend to the point of unconsciousness.

A man from Stebbins was charged with a felony assault for pointing a rifle at a drinking companion and firing a shot between the victim's legs. Although the victim claimed that he was not placed in fear, the defendant had a more realistic view of the offense, so he waived indictment and entered a no contest plea to assault in the third degree.

Both the sender and the recipient of alcohol were indicted for sending a felony quantity of alcohol to the dry village of Shishmaref. During the investigation, the two suspects claimed that they did not know each other and that they had had no contact with each other. A search warrant for phone records disclosed, however, that the sender had made 21 long distance calls to the recipient and that she had made eight to him.

## OSPA

(Office of Special Prosecutions & Appeals)

### Prosecution News

**Elk's Club convicted for possession of gambling devices.** The Elk's Club pled no contest to possession of illegal gambling devices for intermittently using video poker machines between 1995 and 2000. In fining the Elks less than \$5,000 and requiring 80 hours of community work service, Anchorage District Court Judge Lohff gave weight to the "Robin Hood" mitigating factor – the Elks used the ill-gotten gains to make charitable contributions.

**Four men convicted of serious game violations.** Fish and Game prosecutor Jack Schmidt garnered \$30,000 worth of fines in January. Jack Wagner was convicted of illegal possession and transportation of both bear and moose and unsworn falsification, was fined \$7,500 in fines, and lost his hunting privileges for two years. Matthew Miller was convicted on six game violations for killing a bear sow and cub and a moose, was ordered to pay \$15,000 in fines, and had his non-resident hunting privileges permanently revoked. Anthony Justice was convicted of both killing a bear cub and failing to salvage it, was ordered to pay \$5,000 in fines, and had his hunting privileges revoked for five years. Gary Hower was convicted on one count of illegal transportation and possession, was ordered to pay a \$2,500 fine, and had his hunting privileges revoked for five years.

**Man charged with 24 counts of cigarette tax evasion.** Paul Snyder, who owns a store in Sutton known as The Mayor's Place, was charged with 24 counts of tax evasion for importing cigarettes to Alaska for sale and failing to pay over \$30,000 of state excise tax.

**Welfare fraud sentences.** Linda Bolam pled no contest to third-degree theft for receiving

welfare benefits and failing to disclose all the income she received from July 1997 through September 1998. She was sentenced to 365 days in jail with 305 days suspended, ordered to do 400 hours of community work service, and pay over \$8,000 restitution.

In another case, James Springer pled no contest to third-degree theft and unsworn falsification for failing to disclose the number of people living in his house and failing to report all of the income he earned between February 1996 through April 1999. Springer fraudulently received over \$11,000 during that time. He was sentenced to serve a composite sentence of 720 days with 360 days suspended, ordered to do 100 hours of community work service, and pay restitution.

## Petitions & Briefs of Interest

### Petitions of Interest

**Court of Appeals Denies Yet Another Mid-trial Petition on Evidentiary Ruling.** The state sought emergency interlocutory review of Judge Wolverton's ruling that the state could present the jury with only one photo from a photographic array that had appeared in a newspaper. The array showed the victims of six recent homicides and the locations of their bodies; when the defendant's friend showed the newspaper to the defendant, the defendant picked out his victim from among the six photographs. In its petition, the state asserted that the full array bolstered the truth of the defendant's surreptitiously-taped statement, and that using only the victim's photograph without the other photos distorted the truth of what had actually occurred. The only unfair prejudice identified by the defendant was that it associated him with the five other murder victims, but the state was willing to stipulate that the police had no evidence linking the defendant to those victims. The court of

appeals denied the state's petition for review. *State v. Wade*, A-8500.

## Court Decisions of Note - Alaska

### Briefs of Interest

**Waiver of counsel.** Ten days before trial, the defendant waived his right to counsel and elected to represent himself so that his trial could proceed without further delay. The state asserts that the trial judge was not required to reconsider the defendant's waiver of counsel when, on the first day of trial, the defendant asked if he could have "pro bonos" (friends from his village) sit with him during the trial, and when he later asked the court to appoint co-counsel to help him issue subpoenas for the witnesses he wished to call at trial. *Tocktoo v. State*, A-8295.

**Post-conviction relief – prima facie case.** The state asserts that a post-conviction relief application claiming ineffective assistance must be supported by the affidavits of persons with information crucial to the claim. In this case, the defendant claimed his attorney was ineffective for not exercising a peremptory challenge against an allegedly biased juror, but failed to supply the affidavit of the juror. *Mullin v. State*, A-8200.

**Attempted witness tampering by a police officer – sentence appeal.** Judge Wanamaker imposed six months to serve for attempted first-degree witness tampering committed by former Anchorage Police Officer William Goldberg, whose conviction arose out of his attempts to get the victim to lie about their having sexual relations when the victim was 15-years-old. On appeal, the state defends the sentence as having properly expressed community condemnation for Goldberg's abuse of the public trust and also necessary to maintain public confidence in police officers. *Goldberg v. State*, A-8400.

### Statute and Rule Interpretations

**The crime of violating a domestic-violence protective order.** The Alaska Supreme Court held that AS 11.56.740(a), which defines the offense of violating a domestic-violence protective order, requires the defendant to be simply reckless as to the fact that his conduct was prohibited by the protective order. This holding reversed the court of appeals' earlier decision in *Strane v. State*, 16 P.3d 745, 752 (Alaska App. 2001), which incorrectly held that the defendant had to have the specific knowledge that his conduct was prohibited by the protective order. *State v. Strane*, Op. No. 5655 (Alaska, January 10, 2003).